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Land Use Cases Highlight Lessons, Evolving Patterns: The Year in Review

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Abstract: New York courts busily decided a multitude of land use cases in 2008 due to the increased growth in magnitude and complexity of land use issues. This year, as in the past, the authors summarize some of the most important cases. This year's cases include the following topics: judicial deference to land use board decisions, zoning boards of appeals discretion, standard local practice, the New York State Environmental Quality Review Act, statute of limitations, affordable housing, and eminent domain.

This column collects and describes over a dozen of the most significant and interesting land use cases decided by the New York courts since our end of the year report last year: cases that remind practitioners of important lessons or inform them about evolving trends.

The first four cases strike important but familiar judicial themes: that the courts defer to good faith determinations by local legislative bodies, support strong enforcement practices by municipalities, will not tolerate bad faith practices on the part of municipalities, and affirm zoning amendments that conform to the local comprehensive plan.

In *Matter of Rossi v. Ballston*, 854 N.Y.S.2d 573 (N.Y. App. Div. 2008), the landowners claimed that the town board's enactment of a moratorium, revision of its comprehensive plan, and changes to its zoning were a pretext to preclude the construction of a Wal-Mart on their property. The town board asserted that these actions were taken to allow for additional time to review and revise the existing plans to ensure the community's interests and long term needs were being met. The Appellate Court found that the petitioners did not meet their burden of proof to overcome "the strong presumption of validity" given to the town board's adoption of local law.

In *Beneke v. Santa Clara*, 855 N.Y.S.2d 868 (N.Y. Gen. Term 2008), the court supported enforcement of a \$200,000 fine where a property owner continuously disobeyed local zoning law. In this case, the plaintiff proposed to build a two story boathouse on the shore of Saranac Lake. After his application for a building permit was denied because his proposal did not conform with local zoning laws, plaintiff constructed a boathouse on floating pontoons. After several proceedings and appeals, the plaintiff was given until June 1, 2007 to remove his boathouse. When the plaintiff did not comply, the town instituted an action for sanctions under Executive Law § 382(2). The court wrote: “[t]here are few weapons in a Town’s arsenal to deal with residents having deep pockets who are willing to flout local laws. This Town refused to capitulate to its well-financed adversary and it should not be left to innocent taxpayers to see their taxes rise or services diminish because someone had the financial wherewithal to wage a protracted battle.”

In *Downey Farms Development Corp. v. Cornwall*, 858 N.Y.S.2d 542 (N.Y. Gen. Term 2008), due to bad-faith delays by the planning board in reviewing the subdivision application, the developer was awarded vested rights under the prior zoning law. The local legislature upzoned the area encompassing the proposed development from one to two acres for single family residences. The delays during the pendency of petitioner’s application were improper and because the developer showed that it was possible to have obtained approval prior to the amendment, its rights to subdivide under the one-acre zoning had vested.

The importance of conforming zoning to the comprehensive plan is highlighted in *Little Joseph Realty v. Babylon*, 859 N.Y.S.2d 696 (N.Y. App. Div. 2008). The court found that zoning amendments did not constitute spot zoning as alleged. Babylon amended its zoning to authorize hot-mix asphalt facilities as a special exception use in all industrial districts. The amendments permit a use that is consistent with uses in the surrounding area, were not enacted for the benefit of a single owner, and are in conformity with the comprehensive plan. The town board engaged in a thorough review of the amendments prior to their enactment and considered the community’s land use problems.

In 2008 several important cases were decided regarding procedures and substance of awarding variances and interpreting the local zoning ordinance:

Zoning Board of Appeals

The issue of conformity with zoning regulations is within the jurisdiction of the zoning board of appeals (ZBA). In *Ashley Homes of L.I., Inc. v. O’Dea*, 858 N.Y.S.2d 337 (N.Y. App. Div. 2008), the planning board denied the petitioner’s subdivision application because the applicant had failed to meet the area requirements of the amended zoning ordinance. Prior to the planning board’s determination, the ZBA, aware of the amendment to the zoning ordinance, granted the petitioner a one-year extension of a previous variance. The variance, therefore, was still in effect at the time the planning board denied the petitioner’s subdivision application. The court

held that since the planning board's determination was based exclusively upon findings regarding the alleged nonconformity of the petitioner's proposed subdivision with the zoning ordinance, which is within the jurisdiction of the ZBA, the planning board had usurped the power of the ZBA. The court annulled the determination and directed the planning board to approve the subdivision.

In *Riverhead PGC v. Town of Riverhead & Harris v. Town Board of Riverhead*, No. 20504-07, 240 N.Y.L.J. 78 (N.Y. Sup. Ct. October 6, 2008), the town board erroneously undertook to issue a use variance and an interpretation of the zoning, "both of which are solely within the province of the Zoning Board."

In *London v. Huntington*, 855 N.Y.S.2d 561 (N.Y. App. Div. 2008), the court held that a ZBA is not required to explain its departure from prior variances where the evidence establishes that the circumstances of prior variances were distinguishable. Ordinarily, "a determination of an administrative agency which neither adheres to its prior precedent nor sets forth its reasons for reaching a different result on essentially the same facts is arbitrary and capricious." *Id.* (quoting *Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington* 735 N.Y.S.2d 873 (N.Y. App. Div. 2001)).

In *Allstate Properties, LLC v. Hempstead*, 856 N.Y.S.2d 130 (N.Y. App. Div. 2008), a property owner brought an Article 78 action challenging the determination by the ZBA denying its application for area variances. The court asserted that when determining whether to grant an area variance, a ZBA must, pursuant to Village Law § 7-712-b(3), "engage in a balancing test weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted" and consider five prescribed factors. Here, the ZBA engaged in the balancing test and weighed the evidence corresponding to each of the factors. As a result, the determination by the ZBA denying the area variances was rational and not arbitrary and capricious. See also, *Bull Run Properties v. Cornwall*, 855 N.Y.S.2d 585 (N.Y. App. Div. 2008); *Gallo v. Rosell*, 859 N.Y.S.2d 675 (N.Y. App. Div. 2008).

Where a ZBA's denial of findings are supported by evidence in the record and an applicant fails to present evidence to carry its burden of showing that the board's determination was inconsistent with a prior determination based on essentially the same facts, the denied area variance is not arbitrary and capricious. In *Fagan v. Colson*, 856 N.Y.S.2d 153 (N.Y. App. Div. 2008), the ZBA considered and weighed the factors set forth in Town Law § 267-b(3)(b). "[I]ts reliance upon the specific, detailed testimony of a neighbor of the petitioner which was based on personal factual knowledge did not render the determination the product of generalized and conclusory community opposition."

The "special facts exception" will apply under circumstances where the local ZBA willfully and unduly delayed proceedings. In *Mamaroneck Beach & Yacht Club, Inc. v. Mamaroneck*, 862 N.Y.S.2d 81 (N.Y. App. Div. 2008), the board was required to

apply prior zoning law (contrary to the general rule that the current law must be applied) because there was evidence that both a moratorium and subsequent zoning amendments were motivated solely by an intent to prevent the petitioners from constructing the proposed seasonal housing.

Standard Local Practice

In *49 East Maple Avenue, Inc. v. Loniewski*, 854 N.Y.S.2d 757 (N.Y. App. Div. 2008), the court quoted the Court of Appeals in holding that “42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations.” The court affirmed the lower court decision, which held that even if the denial of a land use permit is arbitrary and redressable by an Article 78 or other state law proceeding, it “is not tantamount to a constitutional violation under 42 USC § 1983; significantly more is required.”

“The evidence in this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to make’ and where, as here, conflicting inferences may be drawn, it was the responsibility of the Board, not this Court, to weigh the evidence and exercise its discretion in approving or denying application for the subdivision plat.” *MLB, LLC v. Schmidt*, 856 N.Y.S.2d 296 (N.Y. App. Div. 2008).

Mandamus relief may not be awarded to “compel an act in respect to which the [public] officer may exercise judgment or discretion.” *Albano v. Islip*, No. 28127-2007, 240 N.Y.L.J. 35 (N.Y. Sup. Ct. Jul. 28, 2008). Here, the petitioner brought an Article 78 proceeding to annul and reverse the decision of the town engineer and direct the issuance of a building permit, arguing that the engineer’s determination was arbitrary, capricious, and an abuse of discretion. The permit was denied due to an assessment by the town engineer that the construction would exacerbate drainage and flooding issues. The court held that because “[b]oth §67 of the Islip Town Code and the grant by the Zoning Board of Appeals bestow discretion upon the Department of Planning and Development” mandamus relief was not available.

In *Annabi v. Yonkers*, 850 N.Y.S.2d 625 (N.Y. App. Div. 2008), the court invalidated an ordinance that eliminated the necessity for a supermajority vote to take action that is contrary to a county planning board recommendation. The ordinance was invalidated because the city failed to refer it to the county planning board as required by General Municipal Law (GML) § 239-m. GML § 239-m requires that all zoning actions and amendments affecting real property within 500 feet of a municipal boundary be referred. The court found that the invalidated ordinance, removing the supermajority requirement, affects the entire city, and thus is within 500 feet of a municipal boundary.

The Court of Appeals noted that, where there is reason to believe that a proposed structure may be used for an unlawful purpose, municipal authorities are not required to let the property owner build the building and see what happens. *Matter of 9th & 10th St. L.L.C. v City of New York*, 856 N.Y.S.2d 28 (N.Y. 2008). The court

held that seeking assurances that the building would be used as an educational dormitory, when the applicant failed to show any relationship with an educational institution, was prudent and not arbitrary and capricious. This was not a case of mere possibility of a *future* illegal use.

State Environmental Quality Review Act

To have standing to assert State Environmental Quality Review Act (SEQRA) claims, a party must "demonstrate that it will suffer an injury that is environmental and not solely economic in nature". In *Widewaters Route 11 v. Potsdam*, 858 N.Y.S.2d 820 (N.Y. App. Div. 2008), a property owner brought suit challenging the local board's issuance of a site plan approval and special use permit for retail development. The board declined to require an easement to provide the plaintiff's parcel with direct access over the subject parcel to an adjacent highway. Plaintiff asserted that the project as approved would negatively impact its ability to develop its parcel in the future. The court held that this injury is solely economic in nature.

Statute of Limitations

Legal causes of action challenging procedures followed by a town board in enacting a zoning ordinance are subject to a four-month statute of limitations pursuant to CPLR Article 78, while causes of action challenging the legal validity of the zoning ordinance itself are subject to a six-year statute of limitations. *Schiener v. Sardinia*, 852 N.Y.S.2d 538 (N.Y. App. Div. 2008). Here, a citizens group claimed that the zoning ordinance was inconsistent with the comprehensive plan as required by Town Law § 263. The court found that the group was challenging the substance of the ordinance and the six-year statute of limitations applied.

Affordable Housing

On August 19, 2008, the Second Department Appellate Division affirmed the Supreme Court's May, 2007 ruling in *Land Master v. Montgomery*, which found the town's zoning unconstitutionally exclusionary after the town board had removed all multifamily uses from the ordinance. *Matter of Land Master Montg I, LLC v. Montgomery*, 863 N.Y.S.2d 692 (N.Y. App. Div. 2008). The Appellate Division wrote, "Since the [town] failed to raise a triable issue of fact with respect to whether or not the challenged zoning was enacted without giving proper regard to local and regional housing needs and that it has an exclusionary effect, summary judgment was properly awarded to the plaintiffs based on allegations of exclusionary zoning."

Eminent Domain

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), the plaintiff-appellants argued that the District Court erroneously overlooked substantial allegations that the public uses described by the defendant-appellees were mere pretexts for the use of eminent domain in the Atlantic Yards redevelopment project in Brooklyn and that the private

developer was the sole beneficiary. The Second Circuit disagreed and held that there is “at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass transit improvements.”